

IT 00-17

Tax Type: Income Tax

Issue: Responsible Corporate Officer – Failure to File or Pay Tax

**STATE OF ILLINOIS
DEPARTMENT OF REVENUE
OFFICE OF ADMINISTRATIVE HEARINGS
CHICAGO, ILLINOIS**

THE DEPARTMENT OF REVENUE)	
OF THE STATE OF ILLINOIS)	Case No.
)	
v.)	NOD
)	
JANE DOE,)	Administrative Law Judge
Resp. Officer)	Mary Gilhooly Japlon

RECOMMENDATION FOR DISPOSITION

Appearances: Special Assistant Attorney General Shepard Smith, on behalf of the Illinois Department of Revenue; The Law Offices of Joel N. Goldblatt, Ltd., by Joel N. Goldblatt, on behalf of JANE DOE.

SYNOPSIS:

This matter came on for hearing pursuant to the timely protest by JANE DOE of Notice of Deficiency No. 0000 issued by the Department of Revenue (hereinafter “Department”) on November 5, 1999 in the amount of \$15,047.54 for the 3rd and 4th quarters of 1995, the 1st through 4th quarters of 1996 and the 1st and 2nd quarters of 1997 (hereinafter “taxable period” or “period at issue”). The Notice of Deficiency (NOD) was issued to JANE DOE as a responsible officer of ABC TRAIN, INC. (hereinafter “corporate taxpayer”) who willfully failed to pay over to the Department Illinois Income Taxes withheld from compensation paid to employees of the corporate taxpayer as

required by law. A penalty was therefore imposed under section 1002(d) of the Illinois Income Tax Act, which is equal to the total amount of tax not paid.

The issues to be resolved are whether JANE DOE was a responsible officer of ABC TRAIN, INC., and therefore, required to collect, truthfully account for and pay over the withholding tax for the period at issue, and whether Ms. DOE willfully failed to pay over such taxes for the period at issue. A hearing was held on July 27, 2000. JANE DOE testified, as did Mr. JOHN DOE and Mr. JOE DOE. Upon the consideration of all the evidence elicited in this case, it is recommended that the Notice of Deficiency be cancelled.

FINDINGS OF FACT:

1. The Department's prima facie case, inclusive of all jurisdictional elements, was established by the admission into evidence of a certified copy of Notice of Deficiency No. 3516 issued to JANE DOE on November 5, 1999 in the amount of \$15,047.54 for the taxable periods of the 3rd and 4th quarters of 1995, the 1st through 4th quarters of 1996 and the 1st and 2nd quarters of 1997. (Dept. Ex. No. 1; Tr. p. 5).
2. The parties stipulated that for the period of July 1, 1995 through September 9, 1995, JANE DOE is not the responsible officer and is not liable for the penalty. (Tr. p. 3).
3. The parties further stipulate that from September 10, 1995 through December 31, 1996, JANE DOE is the responsible officer of the corporate taxpayer and is liable for the penalty at issue. (Tr. pp. 3-4).
4. At issue in this hearing, therefore, are the 1st and 2nd quarters of 1997. (Tr. p. 4).
5. The corporate taxpayer was a trade school, training people for the travel and hospitality industry. (Tr. p. 16).

6. Courses were taught by the major airlines, travel agencies and hotels. (Tr. p. 16).
7. Until her husband's death, JANE DOE was involved in student enrollment. (Tr. p. 16).
8. During the period at issue, employees were not paid; no payroll checks were issued. (Tr. pp. 7, 9, 14-15).
9. For approximately two years prior to the remaining taxable period, JANE DOE attempted to find additional investors, or to sell the business. (Tr. pp. 7, 8, 10, 14).
10. The assets of the company were subject to an assignment for the benefit of creditors handled by XYZ PARTNERS in May 1997. (Tr. pp. 7, 11-12).
11. The IL-941 returns for the 1st and 2nd quarters of 1997 are not signed, were not prepared by the controller of the corporate taxpayer and bear an incorrect handwritten suite number for the business address. (Tr. pp. 8; Dept. Ex. No. 2).
12. Employees were not paid in 1997, but payroll was accrued on the corporate books because Ms. DOE hoped to find a buyer or investor who would ultimately pay the employees who remained with the company during tough times. (Tr. pp. 9, 11, 12).
13. By 1997 the company kept its phones on, but was not conducting business; i.e., no students were being enrolled. (Tr. p. 15).

CONCLUSIONS OF LAW:

The Department seeks to impose personal liability on JANE DOE pursuant to section 1002(d) of the Illinois Income Tax Act (35 **ILCS** 5/101 *et seq.*). Said section provides in pertinent part as follows:

(d) Willful failure to collect and pay over tax. Any person required to collect, truthfully account for, and pay over the tax imposed by this Act who willfully fails to collect such tax or truthfully account for and pay over such tax or

willfully attempts in any manner to evade or defeat the tax or the payment thereof, shall, in addition to the other penalties provided by law, be liable for the penalty imposed by Section 3-7 of the Uniform Penalty and Interest Act.

Section 3-7 of the Uniform Penalty and Interest Act (“UPIA”) provides in pertinent part as follows:

Sec. 3-7. Personal Liability Penalty

(a) Any officer or employee of any taxpayer subject to the provisions of a tax Act administered by the Department who has the control, supervision or responsibility of filing returns and making payment of the amount of any trust tax imposed in accordance with that Act and who wilfully fails to file the return or make the payment to the Department or wilfully attempts in any other manner to evade or defeat the tax shall be personally liable for a penalty equal to the total amount of tax unpaid by the taxpayer including interest and penalties thereon. The Department shall determine a penalty due under this Section according to its best judgment and information, and that determination shall be prima facie correct and shall be prima facie evidence of a penalty due under this Section. Proof of that determination by the Department shall be made at any hearing before it or in any legal proceeding by reproduced copy or computer printout of the Department’s record relating thereto in the name of the Department under the certificate of the Director of Revenue. ... That certified reproduced copy or certified computer print-out shall without further proof, be admitted into evidence before the Department or in any legal proceeding and shall be prima facie proof of the correctness of the amount of tax or penalty due. (35 ILCS 735/3-7).

An analysis of the above-cited statutory provision results in the determination that an individual is personally liable for the tax owed by the corporate taxpayer when he or she is found to be both responsible and willful. Regarding the issue of responsibility, the statute mentions “any person required to collect, truthfully account for, and pay over the tax...”. Concerning the issue of willfulness, the statute imposes personal liability upon

such responsible person “...who willfully attempts in any manner to evade or defeat the tax or the payment thereof...”.

The Department’s prima facie case of liability is established once a certified copy of the Notice of Penalty Liability is admitted into evidence. At that point, the burden shifts to the one named as responsible officer to rebut the Department’s prima facie case through evidence sufficient to show that he was either not a responsible officer, and/or that his actions were not willful. (Branson v. Department of Revenue, 168 Ill.2d 247 (1995)).

The issues at hearing, therefore, are whether JANE DOE was a responsible officer of ABC TRAIN, INC., who was under a duty to collect the tax, or account for and pay over such tax to the Department, and whether she willfully failed to pay the tax due.

Nowhere in the UPIA, the Illinois Income Tax Act, or the Retailers’ Occupation Tax (“ROT”) Act (35 ILCS 120/1 *et seq.*, formerly Ill. Rev. Stat., ch. 120, sec. 440 *et seq.*), which also imposes personal liability on responsible corporate officers who willfully fail to file ROT returns or pay the tax due, are the terms “responsible” or “willful” defined. In the case Branson v. Department of Revenue, *supra*, in discussing the willfulness issue, the Illinois Supreme Court reiterated that as section 6672 of the Internal Revenue Code is similar to the ROT Act in that it imposes personal liability upon corporate officers who willfully fail to collect, account for or pay over employees’ social security and Federal income withholding taxes, it may be looked to for guidance. Both statutes impose liability for the tax upon the responsible officer. The Branson Court cited Department of Revenue v. Heartland Investments, Inc. (106 Ill.2d 19 (1985)) in defining willful as follows:

[W]ilful failure to pay taxes has generally been defined as involving intentional, knowing and voluntary acts or, alternatively, reckless disregard for obvious or known risks. (Citations omitted). (168 Ill.2d 247, 255).

In determining whether an individual is a responsible person, the courts have focused on whether that person has significant control over the business affairs of a corporation, and whether he or she participates in decisions regarding the payment of creditors and the disbursement of funds. The duty to withhold taxes and remit them to the Government is generally found in high corporate officials charged with broad control over corporate business affairs who are involved in making these decisions. (See, e.g., Monday v. United States, 421 F.2d 1210 (7th Cir. 1970), *cert. denied* 400 U.S. 821 (1970)).

Ms. DOE acknowledges that she was a responsible officer and liable for unpaid withholding tax for the period of September 9, 1995 through December 31, 1996 (i.e., approximately the last month of the 3rd quarter of 1995 through the 1st, 2nd, 3rd and 4th quarters of 1996). However, she asserts that for the 1st two quarters of 1997, she is not liable because she was not issuing any payroll, and therefore, no withholding tax was due. She contends that she kept track of what her employees were due on the corporate books, so that if an investor came in, or if the business was sold, her employees could be reimbursed for past wages. However, no business was being conducted during that time, other than the business of trying to sell the corporation or interest an investor.

The IL-941 returns for the taxable period (Dept. Ex. No. 2) are filed out, but not signed. Furthermore, the suite number on the returns is not accurate. The corporate controller testified that he was not paid during the period at issue, and he would have known whether any payroll checks had been issued. This testimony corroborates Ms.

DOE' position that she did not willfully fail to pay the tax. As Ms. DOE proffered no evidence concerning her status as a responsible officer of the corporate taxpayer, she has failed to rebut that aspect of the Department's prima facie case. However, in order for personal liability to attach, section 3-7 of the Uniform Penalty and Interest Act requires that the individual be both a responsible officer and have willfully failed to pay the tax due. It is my determination that JANE DOE has successfully rebutted the prima facie component of the Notice of Deficiency concerning willful failure to pay for the 1st and 2nd quarters of 1997.

RECOMMENDATION:

Based upon the foregoing, it is my determination that Notice of Deficiency No. 0000 is affirmed only for the period of September 10, 1995 through December 31, 1996.

Enter: August 28, 2000

Administrative Law Judge